87-1503

FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

Term, 1987

William M. Shipps, Appellant

Vs.

Stoughton Police Department
et. al.
&
Jordan Gelman d/b/a
Autonotive Towing Co.
Appellees

On Appeal from:

United States Court of Appeals

for the First Circuit

William M. Shipps Pro-se
123 Sumner St.
Quincy, MA. 02169
(617) 773-5331

Questions Presented:

1. Can Police Search a vehicle of a non-erring citizen:

a) without probable cause

b) without established procedures

c) without warrant against the occupants, the owner or the vehicle

d) without a judgement against the vehicle, the owner or occupant

e) without trustee process against the vehicle

d) without exigent circumstances

f) without the vehicle or the occupants being involved in the commission of a crime or subject to a valid arrest.

2. Can Police Seize and impound a vehicle of a non-erring citizen:

a) without probable cause

b) without established procedures

c) without warrant against the occupants, the owner or the vehicle

d) without a judgement against the vehicle, the owner or occupant

e) without trustee process against the vehicle

f) without enabling state statutory authority to seize and impound vehicles

g) without exigent circumstances

h) without the vehicle or the occupants being involved in the commission of a crime or subject to a valid arrest.

3. Did the District Court err in its conclusions and order in the following instances:

a) The standard of Expectation of Privacy as set forth in the United States v. Ball, 608 F.2d 910 (1st Cir. 1979) was not controlling.

b) The standard of a Post-deprivation hearing as established under Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) were not controlling.

c) Summary judgement should not have been granted the defendants due to genuine issue of the material facts.

(Table of Contents)

1: Jurisdictional Statement

2: Index and Summary of cited cases

3: Brief

4: Exhibit #1

Defendants response of established police procedures or

contracts for towing.

5: Exhibit #2

MGL Chapter 111B sec.8 (Protective Custody)

6: Exhibit #3

a: MGL Chapter 40 sec. 22D

(Parking and Towing enabling legislation)

b: MGL Chapter 40 sec. 32 (Bylaw Validation Procedure)

7: Exhibit #4

Bill from Automotive Towing, Feb. 6, 1984

8: Exhibit #5

Letter to Automotive Towing, Feb. 17,

1984

9: Exhibit #6

Letter to Chief of Police, June 26, 1984

10: Exhibit #7

Letter to the Seceratary of State, July 8, 1984

11: District Court Order

12: Appeals Court Order

13: Notice of Appeal

JURISDICTION

Jurisdiction to review the judgement and denial for in-banc rehearing of the United States First Circut of Appeals in this case, dated December 10,1987 and January 8, 1988 and entered those same dates is confered upon this Honorable Court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

The following constitutional and statutory provisions which the case invloves are set forth:

1. United States Constitution:
   Amendments IV, V, XIV
2. Title 42 U.S.A.C. section 1983
3. Massachusetts General Laws:
   Chapter 111B s. 8 .....Exh 2
   Chapter 40 s. 22D .....Exh 3a
   Chapter 40 s. 30 .....Exh 3b

Cited Case Index and Holdings

---

1. FORD v BYRD, C.A. TEX 1976, 544 F.2d 194.....pg18

a. Chief of Police liable for acts of his subordinates

2. GIBSON V. CITY OF SEATTLE DEPT. OF THE POLICE, CA Wash. 1973, 472 F. 2d 1220.....pg23

a. State cause of action does not preclude nor bar federal jurisdiction

3. HARRIS v CITY OF ROSENBURG, C.A. Or. 1981, 644 F. 2D 1121.....pg16

a. Qualified Immunity must be proven to trier of fact

4. HOLLIS V. BAILEY, E.D. Mo. 1981, 524 F. Supp.565.....pg19

a. Operator stopped for speeding violation

b. Officer told operator had weapon causing search

c. Abandoned vehicle on highway

safety hazard

5. HUDSON V. PALMER, 82 L Ed 2d 393....pg9

a. Privacy of home, automobile, office different from prison cell

6. KELLER V. HIGENDORF, D.C. Wis. 1978, 79 F.R.D. 687.....pg20

a. Rights deprivation squarely under 42 USAC 1983

7. LURIIA BROS. & CO. v ALLEN, PA 1979, 469 F. SUPP 575.....pg16

a. Intent and Knowledge matter for trier of fact

8. LYNCH V. HOUSEHOLD FINANCE CORP., 405 US 538.....pg21

a. Personal rights in property is the same as right to liberty

9. MCLELLAND v FACTEAU, C.A. N.M. 1979, 610 F.2d 693..... .. .pg18

a. Police Chief becomes Respondent Superior if he breaches duty to:

1) train subordinates

2) establish departmental procedures

10. VOUTOUR v VITALE, 1ST CIR. 1985, 761 F.2d 812.....pg17

a. Good Faith is without knowledge or intent

b. Failure of Police chief to properly train precludes summary judgement

11. WATERS V. PARRISH, D.C. Va 1975, 402 Supp 696.....pg23

a. Seizure without opportunity to challenge lawfulness is deprivation of due process right

12. UNITED STATES V. DALL, 608 F.2D 910 (1st Cir. 1979).....pg11

a. Expectation of privacy only diminished if the totality of the circumstances merit such diminution.

THE SUPREME COURT

of the

UNITED STATES

William M. Shipps	*	Civil Action No.
Plaintiff	*	
V.	*	
Stoughton Police	*	
Department	*	Plaintiffs Appeal
et al.	*	Brief
&	*	
Jordan Gelman d/b/a	*	
Automotive Towing Co.	*	
Defendants	*	

****

Issues:

1. Can Police Search a vehicle of a non-erring citizen:

a) without probable cause

b) without established procedures

c) without warrant against the occupants, the owner or the vehicle

d) without a judgement against the

vehicle, the owner or occupant

e) without trustee process against the vehicle

d) without exigent circumstances

f) without the vehicle or the occupants being involved in the commission of a crime or subject to a valid arrest.

2. Can Police Seize and impound a vehicle of a non-erring citizen:

a) without probable cause

b) without established procedures

c) without warrant against the occupants, the owner or the vehicle

d) without a judgement against the vehicle, the owner or occupant

e) without trustee process against the vehicle

f) without enabling state statutory authority to seize and impound vehicles

g) without exigent circumstances

h) without the vehicle or the occupants being involved in the commission

of a crime or subject to a valid arrest.

3. The district court erred in its conclusions and order in the following instances:

a) The standard of Expectation of Privacy as set forth in the United States v. Dall, 608 F.2d 910 (1st Cir. 1979) are not controlling.

b) The standard of a Post-deprivation hearing as established under Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) are not controlling.

c) Summary judgement should not have been granted the defendants due to genuine issue of the material facts as follows:

1) Officer Poillucci admitted to entering the vehicle twice in Stoughton District Court and now in his affidavit to the US District court states he only entered the vehicle once.

2) The defendants now claim the

vehicle was parked in the middle of the street but yet they never affixed a parking ticket (violation notice) to the vehicle.

3) The defendants claim they had the vehicle towed in accordance with usual police practices yet are unable to produce any definitive police policy for towing of vehicles.

d) The district court should have allowed the pro-se plaintiff's motions for hearings on The defendants failure to participate in discovery and taking of depositions. As well as allowed a hearing on and the opportunity as requested to present documentation and witnesses to prove count two of his original complaint. As well as to name those others that conspired in other related incidents to violate his constitutional rights.

Facts:

The circumstances surrounding the incident to the best of my knowledge and belief are as follows:

On Oct. 9, 1983 at about 2:45 AM my son William Jr. and his friend were sitting in my 1976 Ford in front of my next door neighbor's house on the left side of the Kwedar Ave. facing towards West St. in the town of Stoughton. My vehicle was about 150 feet from the property line of my house and my son's home at the time. Two vehicles pulled up to my parked vehicle. One a pickup truck which came from a intersecting way Poskus street. It went around my vehicle and stopped diagonally in front of it. The police cruiser pulled up in back of my vehicle boxing it in and preventing any means of exiting. The pickup was owned by reserve police officer Wyner of Stoughton. Police Officer (Francis Poillucci) in

uniform got out of his police cruiser and came to my vehicle. He tried to open the vehicle door by working the door handle on the driver's side where my son was sitting. When the door did not open. He banged on the window. My son rolled down the window and asked can I help you. Officer Poillucci said "Step out of the car." My son's response was "Why." With that Officer Poillucci reached inside the car unlocked and opened the door of the car. The officer then restated himself "Step out of the car". My son stepped out of the car and the officer informed him he was being placed under protective custody under the provisions of Chapter 111B Section 8 M.G.L. (See exhibit 2). My son and his friend were hand cuffed behind their backs and escorted to the police cruiser.

Officer Poillucci placed the two boys

in the police cruiser. Officer Poillucci called the tow company, Automotive Towing, on the police radio and ordered the vehicle towed in violation of Chapter 40 section 22D which requires that a ranking officer of sergeant or higher to order a vehicle towed (See exhibit 3a). Officer Poillucci then demanded that my son give him the keys to the vehicle or he would have it towed in park. Before giving him the key, that was in his back pocket at the time. My son stated "there is no need to tow the car. I live right next door." Officer Poillucci stated, "I know where you live. Where are the keys." My son then stated, "look there is no need to tow the vehicle my mother is home and she can move the vehicle some 200 feet into my house's driveway." Officer Poillucci rejected my son's suggestion and took the two boys to the Stoughton Police Station. There, the duty officer, Sergeant Crogan

inventoried my son's personal belongings. Officer Poillucci admitted in the Stoughton District court that he checked the glove compartment of the vehicle for the car's registration before the tow company, Automotive Towing Company, was given custody and control of the vehicle.

The vehicle was towed to Automotive's holding location on Washington St. in Stoughton. This location was a secured parking lot with a high chain link fence around it, with a locked gate. My son was allowed to call his mother and he was released in her custody about 30 minutes after he was booked for protective custody (about 3:30 AM). He received his inventoried belongings from Sergeant Corgam except the keys to the vehicle which the police kept. The police still in possession of the keys, to the vehicle, later that day went to Automotive's

facility and made a second search of the vehicle. Neither search was made pursuant to a search warrant.

The vehicle was registered and the ownership title was in my name although my wife used it as our second vehicle. I was not notified by the police or the towing company until on or about Dec. 14, 1983 at which time I called Automotive Towing to resolve the matter. By this time the towing and storage charges was over $900. I told Mr Jordan Gelman that I was under the impression that the towing of the vehicle was without authority or cause. But I did make an arrangement to meet him at the storage location in Stoughton. The following week at about 11:45 AM I was at the storage location as per agreement and no one was there from the towing company. I asked one of the garage mechanics to try and reach someone on the two way radio

which he did with no success. I did not here from Automotive Towing next until there letter of Feb. 6, 1984. It stated that I now owed them over $1700.00 for the towing and storage (See exhibit 4). I wrote him a letter on Feb. 17, 1984 reiterating my position regarding the towing being without authority or cause and was nothing more than police harassment (See exhibit 5).

When Mr. Gelman did not respond to my second letter as requested. I sought complaint in the Stoughton District court for small claims on June 26, 1984. At trial on July 23, 1984 it was testified to that not only does the town not have enabling by-laws to tow any parked vehicle, but the Chief of Police is awarding the towing work without competitive bids as required by Chapter 40 Section 22D M.G.L. Furthermore, the

Chief of police who is responsible for the awarding of any towing contracts has withheld all the records from me even though I had properly requested them under the freedom of information act by letter delivered in hand by me on June 26, 1984 @ 2:03 PM. (See exhibit 6). I wrote to the Secretary of State on July 8, 1984 to force the Chief of Police to provide me with the records regarding the towing of my vehicle (See exhibit 7). He also resisted a subpoena delivered by the Norfolk County Sheriff's office issued under rule 45 of the Massachusetts Rules for Civil Procedure and would not allow any off his off duty officers to accept service.

At trial the Judge requested the Officer (Poillucci) with the records to call the chief and request him to come to the court. In as much as my subpoena was

for the chief personally and not for the keeper of the records. His excuse for not providing the requested records to me or the Secretary of State's Office, was that the District Attorney's office told him not to. The intervening of the district attorney's office in a small claims civil complaint is without precedent or jurisdiction.

The Chief under direct examination on the stand testified. He participated in the public safety committee that formulated the by-laws for towing in the town of Stoughton. Also that as of June 24, 1984, nine months after the towing incident, had just been submitted to the Attorney General for approval as required before any by-law has the force of law under the provisions of Chapter 40 Section 32 M.G.L. (See exhibit 3b). He had no answer as to my question of, without the

approval of those by-laws under what statutory authority did he allow the vehicle to be towed at the time it was towed. Officer Poillucci the officer who ordered the vehicle towed admitted he never issued a traffic citation or parking ticket. The issuing of a citation must be done before any person's lawfully owned property can be seized and towed, particularly when it is next door to their home and on a public way. He also admitted that he searched the vehicle twice.

Expectation of Privacy

The district court has misconstrued the law when it applied the standards as established under Hudson and Dall to this matter. When the Supreme Court established the standard of diminished expectation of privacy in the case of

HUDSON v. PALMER 82 L Ed 2d 393. It only limited the expectation of privacy of a prisoner in prison when it clearly stated "A prison shares none of the attributes of privacy of a home, an AUTOMOBILE, an office, or a hotel room." Holding that the protected privacy rights of an automobile was on the par with the other privacy rights. The court did not limit the privacy rights of non-erring citizens. To the contrary, it set the limits of which a prisoner in prison rights had been diminished due to the extenuating need for security, the protection of both the prison population and the prison officials. It set this standard as the exception to the rule but not to be the rule for diminishing the privacy rights of non-erring citizens. The Supreme court in no way limited the right to privacy of the general public nor did it intend too. Using this narrow limited standard to

bridge the fourth amendment constitutional right of a non-erring citizen of being protected against unreasonable search and seizures without warrant is not the law nor has ever been.

The Supreme court in Hudson and other cases of prisoners in prison was bedeviled by the question of what rights do prisoners in prison have. It agonized over the question, "if prisoners rights are deminished, to what extent should they be". In deciding these cases the court allowed for a meaningful post-deprivation hearing. But did not require prison officials to obtain a search warrant prior to searching a prison cell. It never indicated any intent to expand this constitutional limitation to the non prison population or the general public. Post-deprivation is not the rule for non-erring citizens. Due process of law

demands that every person be given a full and fair hearing BEFORE any deprivation of his liberty or property can be enforced on him. A post-deprivation hearing does not satisfy this standard.

Furthermore, in Dall the First District was dealing with the suppression of contraband under the exclusionary rule. When it decided that the defendant has a deminished expectation of privacy. In the instant case the plaintiff is not nor are the occupants of the vehicle defendants attempting to suppress any contraband at the time of the two searches and the seizure.

Locus of the Search

The district court misconstrued the standards of Dall when it applied those standards in this instance. In Dall the

stop and inquiry was in conjuntion to an arrest of the occupants after hot pursuit of the vehicle for speeding and failure to stop. That is not the circumstance in the instant case. In the instant case the vehicle was parked and it created no hazard to the public nor was there an arrest of the occupants for any violation of law. Furthermore the police did not issue a traffic citation, at the time of the search and the seizure, for illegal parking. This would be the normal, as well as statutory procedure, to follow. If they had the statutory authority to tow and seize the vehicle in the first instance. Demonstrating, that the defense of the vehicle being parked in the middle of the road, is a most recent contrivance. The locus of a search, never mind the seizure, must be reasonable and confined to the area in which an arrest is made or at less within plain view. Nothing less than this

is required.

The locus of the search in this instance is clearly spelled out and limited by Mass. General Laws Chapter 111B sec. 8 par. 5 line 3.(Exh #2). Where it states "If a police officer reasonably believes that his safety or the safety of other persons present so requires, he may search such person and his IMMEDIATE SURROUNDINGS, but ONLY to the EXTENT NECESSARY to DISCOVER and SEIZE any DANGEROUS WEAPONS which may on that occasion be used against the officer or other person present;...". Therefore, the police once having required the occupants out of the vehicle, placing them in protective custody, hand cuffing them behind there backs and placing them in the police car could not reasonably have believed that their safety was in danger by a weapon in the plaintiff,s vehicle.

The two entries by the police into the vehicle after that point without the owners consent was a violation of said statute and was without cause or justification.

More than that, the fourth amendment requires that even with a warrant that the area to be searched shall be described with particularity and that there must be probable cause under oath for a search warrant to issue.

Furthermore, in Dall, we have a defendant trying to suppress contraband discovered within the locus of a search of his vehicle. The vehicle in Dall was from out of state. It was involved in a violation of law (speeding and high speed chase by the police) and the occupants were subject to an arrest. We have no such circumstances or suppression issues in

this matter. There was no contraband. There were no weapons. There was no arrest. It is the contention of the plaintiff that a non-erring citizen has every expectation of privacy in his effects and there must be probable cause before that privacy is violated.

In addition, the locus of a search only becomes a question, when the search is valid to begin with and the constitutional limits of the search is challenged. It does not set the standard as to whether the search was justified in the first instance.

The district court has construed the constitution to be permissive in this instance, where it stated that the "Plaintiff seeks to establish a protected privacy interest on the sole basis of his ownership of the car.". The plaintiff

contends that the right to his privacy is already protected under the U. S. Constitution and he need not establish what is already his constitutional right. Moreover, if lawful ownership, without any other extenuating circumstances or violations of law, is reason enough to protect a non-erring citizen from a search warrant being issued against him by a Court Magistrate, then a warrantless search and seizure by the police, as in this instance, can not be valid or permitted.

The district court in its ruling that because the plaintiff permitted his still lawful wife, living at his lawfully owned home, the use of his lawfully owned vehicle looses his expectation of privacy in the vehicle is without sound reason. Understanding, that his wife committed no violation of law personally or with the

vehicle. This would be to conclude that if a law abiding person permits another law abiding person to use his automobile, home, brief case or other personal property that it then becomes fair game for the police to search and seize, flies in the face of reason. If such a standard were the rule the police would have the right at any time to search and/or seize unattended property without warrant or cause. This reasoning could be extended to if even a justice of this court. If he were to leave his vehicle, with his personal effects and papers in it, in the care of even a parking attendant. Such a temporary transfer of care or custody does not make the vehicle subject to a warrantless search and seizure.

Furthermore, the district court in its order only answered the question of search. It never addressed the question of

seizure when citing and discussing Dall. These two issues are not mutually inclusive and must be treated as separate issues. Even if the court was to find that the police had the authority in this instance to search. No matter how far it reached, it could not found the seizure to be lawful or reasonable.

The defendants allege that the plaintiff is vicariously asserting violations of his civil rights through his son. The plaintiff denies this accusation and has so stated to the Court that he is asserting his rights as the property owner whose property was searched and seized without warrant and was deprived thereof without due process.

The defendants allege they are immune from liability because they acted in "Good Faith." In order for the defendants to

avail themselves of a "Qualified Immunity" defense they must demonstrate to a trier of fact, they acted without intent or knowledge that their actions would violate the constitutional rights of the plaintiff. Therefore, as in LURIA BROS. & CO. V. ALLEN, D.C. PA 1979, 469 F. Supp. 575 the court found that intent and knowledge is "matter for the trier of fact, not matter for disposition by Summary Judgement." as the facts demonstrate in this case.

Moreover, if the defendants are alleging a Good Faith defense, and want to be entitled to Qualified Immunity from liability, they must prove to a trier of fact that "they were acting sincerely and with the belief that they were doing right, not knowing that their official actions would violate the plaintiff's constitutional rights, i.e., SUBJECTIVE

GOOD FAITH, and that they could not reasonably have known that their official actions would violate those rights, i.e., OBJECTIVE GOOD FAITH." (See HARRIS V. CITY OF ROSENBURG C.A. Or. 1981, 644 F.2d 1121.) This determination can only be accomplished through an evidentiary hearing with the right of cross examination.

The defendants cite of VOUTOUR V. VITALE, 1ST CIR. 1985, 761 F.2d 812 as holding that officers performing discretionary functions have a "Good Faith" immunity from liability for civil damages when their conduct did not amount to an intentional violation of constitutional right. The pertinent holdings as I read them are as follows not as represented by the defendants. First, fact issues existed precluding summary judgement for Police Chief on theory of

failure to properly train; secondly, town could only be found liable if it knew or Town Manager knew or should have known of the Chief's improper training. In the instant case the Chief as well as other town officials on the public safety committee knew towing was illegal without the proper bylaws, yet they permitted the towing of vehicles in the town. The appeals court on rehearing said, "Viewing the facts most favorable for the plaintiff, we think a sufficient showing was made of genuine issues of material fact concerning whether or not the Chief and the Town are liable under 42 U.S.C. 1983 for having violated the plaintiff's constitutional rights."

The defendant Police Chief, William Gross, participated in the public safety committee of the Town of Stoughton to formulate bylaws and ordinances for

parking and towing. Chief Gross knew or should have known the town did not have the authority to tow vehicles for illegal parking at the time of the incident. So he cannot claim "Qualified Immunity" for under FORD V. BYRD, C.A. Tex 1976, 544 F2d 194 the court found that "Chief of Police was vicariously liable for acts of his subordinates, who allegedly violated the plaintiff's civil rights in connection with the search of his automobile, only if the chief directed, ordered, participated in or approved their acts. Chief Gross is approving the acts of his subordinates when after notice he fails to take corrective action. Chief Gross becomes a "Respondent Superior" as defined by MCLELLAND V. FACTEAU, C.A. N.M. 1979, 610 F.2D 693 which states "Police Chief may be held liable if he breaches his duty to train subordinates and establish department procedures that will provide

protection for constitutional rights or duty of supervision to correct misconduct of which he has notice." The facts show that Chief Gross failed to train his subordinates, establish departmental procedures and take corrective action after notice of a violation. (See enclosed, Exh. #1 defendants response to plaintiff's request for established police procedures.)

In the defendants' analysis of the holdings in DIEHL V. GAVIN, M.D. Pa. 1984, 585 F. Supp. 1310, 1313 I concur. The police officer acted reasonably in his sincere belief that the defendant had carried out an earlier threat to burn his house down when he saw the defendant coming from the direction of his house and there was smoke also coming from the same direction. This case is in no way analogous to the instant case. There was

no reason to believe a felonious act had occurred nor was the vehicle used in an illegal manner nor was there any exigent circumstances.

The defendants cite the so called analogous case of HOLLIS V. BAILEY, E.D. Mo. 1981, 524 F. Supp. 565 where a police officer stopped a vehicle on a public highway and had the vehicle towed after arresting the operator. The defendants have not stated the complete facts of the case as
I read them. In HOLLIS V. BAILEY the operator was stopped for speeding and was arrested for it. Incidental to that arrest the officer was told that the defendant had a weapon. Which gave rise to his searching the front seat of the vehicle. In conjunction to the arrest of the operator for a moving violation the officer had the vehicle towed because

abandoning it on the highway would create a public safety hazard. The vehicle in this instance was within 200 feet of the plaintiff's home. It was on a sparsely traveled country road and most important the occupants of the vehicle were not operating the vehicle nor were they "arrested" for any violation of law. The vehicle was not parked in a restricted parking area, nor at any time was there cause to believe the occupants of the vehicle had a weapon, giving rise to the initial search. Furthermore in HOLLIS V. BAILEY there was no second search without warrant at the towing company's facility.

The court also found under KELLER V. HIGENDORF D.C. Wis. 1978, 79 F.R.D. 687 that "claims for damages resulting from unconstitutional search and seizure falls squarely within cause of action provided by this section governing civil action for

deprivation of rights"(42 USCA 1983).

The defendants claim there is no genuine issue of material fact. The plaintiff argues that there is a major issue of material fact that goes to the heart of the complaint. Officer Poillucci in the Stoughton District Court under oath testified that the vehicle was searched twice. Once at the scene to only get the registration of the vehicle out of the glove compartment and later at the towing company's facility to do a so called inventory search. Officer Poillucci now in his affidavit of July 29, 1986 states under oath that he only inspected the front seat of the vehicle at the time of the arrest for weapons. There was no arrest, the boys were placed in protective custody which is a public assistance statute (See Exh. #2). The admission of a second search was made known to defense

counsel in plaintiff's deposition under oath on June 20, 1986. Therefore, defense counsel had specific knowledge of this fact prior to submitting Officer Poillucci's questionable affidavit to the court.

The defendants allege that the vehicle was illegally parked. Although they fail to cite or produce any statutory authority, properly implemented, showing that the vehicle was illegally parked (see Exh # 3). It is the contention of the plaintiff that a vehicle cannot be illegally parked if the municipality does not have any bylaws or ordinances making the area in question a restricted parking area. In this instance, there were no restrictions on parking in this area nor was it posted with signs giving notice of any restrictions as required by law. Moreover if the area was a restricted area

why did not the police issue a traffic citation (due process notice) for the so-called illegal parking. The statutory and normal police procedure before towing a vehicle is to issue a traffic citation stating the alleged violation and then have a ranking officer order the vehicle towed, if the vehicle is in a sign posted tow zone, in jurisdictions that have statutory authority to tow vehicles.

Officer Poillucci now in his affidavit boldly states that he had the vehicle towed in accordance with usual police practices. Although under discovery when the defendants were asked for official procedures used by the police department for the towing of vehicles their response was "the defendants state that there are no such documents" (See Exh. #1).

The plaintiff believes that the case law on actions brought under Title 42 U.S.A.C. Section 1983 falls directly under the jurisdiction of this court. Even if the plaintiff had a remedy in state court it does not create a bar from bringing this action as decided in GIBSON V. CITY OF SEATTLE DEPT. OF THE POLICE, CA Wash. 1973, 472 F. 2d 1220. Where the court said "Fact that plaintiff, brought suit under this section of the basis of allegations that the defendants (police) had seized and and confiscated certain items of the plaintiff's personal property without cause and under the color of state law, allegedly had a state cause of action for common law conversion did not preclude federal jurisdiction."

The court in other parallel cases as in WATERS V. PARRISH D.C. Va 1975, 402 Supp 696 decided "If a policeman, acting

under the color of state law, seized motorist's automobile in such a way as to deprive the motorist of any opportunity to challenge the lawfulness of the seizure, the police deprived the motorist of due process.", which is the case here, when a public assistance law was used to disguise the unlawful search and seizure of private property without warrant, statutory authority or cause. The plaintiff was not given notice nor would the police provide material documentation of the incident in order to permit the plaintiff to challenge the lawfulness of their actions.

The fact pattern of all the cases cited by the defendants were that the plaintiff's were prisoners in prison alleging violations of their civil rights while incarcerated. The standards set in GIBSON V. CITY OF SEATTLE DEPT. OF THE POLICE and other parallel cases are

controlling in regard to plaintiff in this matter. The cited cases by the defendants has not changed or limited the constitutional rights or access to the Federal Courts by non-erring citizens of the United States. To the contrary, the expanding of the narrow effects of these decisions of the prisoner/prison relationship on the general public would be to make a nullity of the congressional enactment 42 USC 1983. I submit that the Supreme Court has not gone that far in addressing or limiting the violation of the plaintiff's constitutional rights nor does it intend to; making this matter a clear federal question ripe for adjudication.

The issue is not of property rights singularly but of personal liberties as well. As noted in LYNCH V. HOUSEHOLD FINANCE CORP., 405 US 538. The court

dispelled any notion that there was a dichotomy between the two rights when it said;

"A final compelling reason for rejecting a "personal liberties" limitation upon Section 1343 (3) is the virtual impossibility of applying it. The federal courts have been particularly bedeviled by "mixed" cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. The case before us presents a good example of the difficulties created by this test.

Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. PEOPLE HAVE RIGHTS. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is

in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That the rights in property are basic civil rights has long been recognized..... Congress recognized these rights in 1871 when it enacted the predecessor of sections 1983 and 1343 (3). We do no more than reaffirm the judgement of Congress today."

CONCLUSION:

In view of the foregoing circumstances and as enumerated bellow I have reason to believe that my United States Constitutional Rights were violated by the named defendants with forethought

and knowledge. They also acted under the color of law with deliberate recklessness without statutory authority, cause or warrant:

1. The police chief knew he did not have statutory authority to tow a vehicle under the provisions of Chapter 40 section 22D M.G.L. at the time of the incident. He also knew the by-laws of the town had not been formulated nor had they been submitted to or approved by the Attorney General as required under the provisions of Chapter 40 Section 32 M.G.L.

2. There was no out standing traffic violations or warrants issued against the owner or vehicle.

3. There were no outstanding liens, judgments or seizure orders issued against the owner or the Vehicle.

4. The vehicle was not involved in an accident nor was it disabled or abandoned on a public way or on private property.

5. The vehicle nor its occupants were involved in the commission of a felony or a suspect of one nor were they the subject of a hot persuit with exigent circumstances.

6. The vehicle was not parked in a restricted parking area in violation of any town ordinance or by law as established under the provisions of Chapter 40 M.G.L.

7. The vehicle was not parked in such a manner as to create a public nuisance or hazard.

8. They deliberately kept the keys

to the vehicle to so called "inventory search" the vehicle twice without warrant.

9. Any contracts, orders or requisitions for towing was not awarded by the Chief of Police by competitive bids as required by Chapter 40 Section 22D M.G.L. (See exhibit 1 admission of Chief of Police that there were no contracts with towing companies)

10. There was never probable cause for a stop and frisk never mind a search and seizure without warrant.

11. The police recklessly under the color of state law misused a public assistance statute to commit an illegal search and seizure. Providing the plaintiff with no means of challenging the lawfulness of their actions.

Therefore, I have reason to believe that my rights under the Fourth, Fifth, and Fourteenth Amendments were violated under the color of law by a state action. The defendants did knowingly and by design (not by random action) willfully deprive the plaintiff of his property. The defendants did willfully deny the plaintiff the right to due process by not providing him with public records under the freedom of information act which prevented him from being able to challenge the lawfulness of their actions. The defendants did willfully and unreasonably search and seize effects of the plaintiff without warrant. Making this suit a clear Federal question, which would give this court jurisdiction over this action brought under Title 42 U.S.A.C. Section 1983.

Although the question of the

lawful ownership of property may be a matter of state court jurisdiction. But it is not an issue in this case. The right of not being deprived of property is clearly founded in the United States Constitution. Additionally Congress when it enacted 43 USC Section 1983 provided a statutory remedy for the deprivation of that right if committed under the color of state law. It is not the mere possession of the property that is at issue. It is the "constitutional right not to be deprived" of life, liberty or property, without due process of law that is also in question. I submit that a deprivation of my personal property and rights has occurred without due process by public officials without statutory authority.

Moreover, the matter before this honorable court has sufficient material fact issues in dispute to demand a full

evidential hearing. It is not a matter to be disposed of by summary judgement. This, of all the cases cited and read by the plaintiff, is the most reckless and wanton misuse of governmental authority. It cries out for adjudication and meaningful remedy. The constitution was drafted to prevent exactly this type of arbitrary warrantless intervention into the private lives of its citizens by governmental officials.

The plaintiff prays that this court will assert jurisdiction and provide him with the proper forum to adjudicate the matter thus affording him the opportunity of a meaningful remedy that will deter such unlawful activities by public officials in the future.

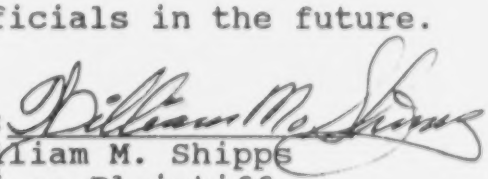
By: 
William M. Shipps
Pro se Plaintiff
123 Sumner St.
Quincy, MA 02169

Exhibit #1

United States District Court
District of Massachusetts
Civil Action No. 86-1364-K

Response of the Defendants .... to Plaintiff's Request for Production of Documents

The defendants William Gross, Thomas Grogan and Francis Paluchi respond to the plaintiff's request for the production of documents as follows:

1. Police reports to be produced. The defendants object to producing any documents prepared by themselves or their counsel in anticipation of litigation or on preparation for the trial of this action.

2. The defendants object to requesr No. 2 on the grounds that it is unintelligible. To the extent that it requests official procedure manuals with respect to towing vehicles, the defendants state that there are no such documents.

3. The defendants object to the producing the documents requested in paragraph 3 on the grounds that it seeks documents not relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence.

By Their Attorney

John D. Bolye
Sloane and Walsh
10 Tremont St.
Boston, MA. 02108

Exhibit # 2

ALCOHOLISM **M.G.L. 111B S. 8**

S. 8 Incapacitated persons; assistance to facility or protective custody

Any person who is incapacitated may be assisted by a police officer with or without his consent to his residence, to a facility or to a police station. To determine for purposes of this chapter only, whether or not such person is intoxicated, the police officer may request the person to submit to reasonable tests of coordination, coherency of speech, and breath.

Any person assisted by a police officer to a police station shall have the right, and be informed in writing of said right, to request and be administered a breathalyzer test. Any person who is administered a breathalyzer test shall be presumed intoxicated if evidence from said test indicates that the percentage of alcohol in his blood is ten one hundredths or more and shall be placed in protective custody at a police station or transferred to a facility. Any person who is administered a breathalyzer test...

A police officer acting in accordance with the provisions of this section may use such force as is reasonably necessary to carry out his authorized responsibilities. If the police officer reasonably believes that his safety or the safety of other persons present so requires, he may search such person and his immediate surroundings, but only to the extent necessary to discover and seize any dangerous weapons which may on that occasion be used against the officer or other person present; provided, however, that if such person is held in protective custody at a police station all valuables and all articles which may pose a danger to such person or to others may be taken from him for safekeeping and if so taken

shall be inventoried.

A person assisted to a facility or held in protective custody by the police pursuant to the provisions of this section, shall not be considered to have been arrested or to have been charged with any crime. An entry of custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the officer in charge, whether the person held in custody exercised his right to make a phone call, whether the person held in custody exercised his right to take a breathalyzer test, and the results of the breathalyzer test if taken, which entry shall not be treated for any purposes, as an arrest or criminal record.

Any person who is incapacitated may be assisted by a police officer with or without his consent to his residence, to a facility or to a police station. To determine for purposes of this chapter only, whether or not such person is intoxicated, the police officer may request the person to submit to reasonable tests of coordination, coherency of speech, and breath.

Any person assisted by a police officer to a police station shall have the right, and be informed in writing of said right, to request and be administered a breathalyzer test. Any person who is administered a breathalyzer test shall be presumed intoxicated if evidence from said test indicated that the percentage of alcohol in his blood is ten one hundredths or more and shall be placed in protective custody at a police station or transferred to a facility. Any person who is administered a breathalyzer test...

A police officer acting in accordance with the provisions of this section may use such force as is reasonably necessary to carry out his authorized

responsibilities. If the police officer reasonably believes that his safety or the safety of other persons present so requires, he may search such person and his immediate surroundings, but only to the extent necessary to discover and seize any dangerous weapons which may on that occasion be used against the officer or other person present; provided, however, that if such person is held in protective custody at a police station all valuables and all articles which may pose a danger to such person or to others may be taken from him for safekeeping and if so taken shall be inventoried.

A person assisted to a facility or held in protective custody by the police pursuant to the provisions of this section, shall not be considered to have been arrested or to have been charged with any crime. An entry of custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the officer in charge, whether the person held in custody exercised his right to make a phone call, whether the person held in custody exercised his right to take a breathalyzer test, and the results of the breathalyzer test if taken, which entry shall not be treated for any purposes, as an arrest or criminal record.

Exhibit # 3a

CITIES AND TOWNS ---- POWERS AND DUTIES
40 S. 22D
S. 22D Vehicles parked in violation of law; removal

In a city or town which accepts this section, as hereinafter provided, the city council or board of selectmen, or if, in any city or town, some other board or commission is empowered to establish traffic regulations, such other board or commission, may adopt, amend, alter or repeal rules and regulations, with such limitations, if any, as may be deemed proper, authorizing the chief officer of the police department or such sergeants or other officers of higher rank in the police department as he may from time to time designate, to remove, to some convenient place through the agency of a person or persons in the employ of the police department or by an independent contractor selected in accordance with law, by-law, or ordinance, on the basis of competitive bids, any vehicle parked or standing on any part of any way under the control of the municipality in such a manner as to obstruct any curb ramp designed for use by handicapped persons as means of egress to a street or public way, or to occupy or obstruct any parking space reserved for a vehicle used by a disabled veteran or handicapped person whose vehicle bears the distinguishing license plate authorized by section two of chapter ninety, or to impede in any way the removal or plowing of snow or ice or in violation of any rule or regulation which prohibits the parking or standing of all vehicles on such ways or portions thereof at such time and recites that whoever violates it shall be liable to charges for the removal and storage of the vehicle as well as subject to punishment by fine.

Exhibit # 3b

CITIES AND TOWNS ---- POWERS AND DUTIES
40 S. 32

S. 32 Validation of by-laws; procedure

Except to the extent that a zoning by-law may take effect as provided in section five of chapter forty A, before a by-law takes effect it shall be approved by the attorney general or ninety days shall have elapsed without action by the attorney general after the clerk of the town in which a by-law has been adopted has submitted to the attorney general a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with. Such request and proof shall be submitted by the town clerk within thirty days after final adjournment of the town meeting at which such by-law was adopted. If the town clerk fails to so submit such request and proof within such thirty days, the selectmen, within fifteen days thereafter, may submit a certified copy of such by-law with a request for its approval, a statement explaining the proposed by-law, including maps and plans, if necessary, and adequate proof that all procedural requirements for the adoption of such by-law has been complied with. If the attorney general does not, within said ninety days, request of such town clerk in writing further proof of such compliance stating specifically wherein such proof is inadequate, it shall be presumed that the proof submitted was adequate. If the attorney general disapproves a by-law he shall give notice to the town clerk of the town in which the the by-law was adopted of his disapproval,

Exhibit # 4

AUTOMOTIVE TOWING
591 Washington Street
Stoughton, Mass. 02702
344-8429

TEN (10) DAY NOTICE
NOTICE TO OWNER OF VEHICLE WHO INCURS CHARGES VOLUNTARILY FOR CARE OF VEHICLE UNDER G.L. 255, S 25 & 26

Date: 2/6/84

TO: Mr. William M. Shipps
169 Quincy Shore Dr. Quincy, Ma 02169
Name and address of owner of vehicle

Description of vehicle: 1976 Ford Maverick 397-FFA
Year Make Model Reg.No. Vehicle I.D.No.
Date towed and stored: 3:00 A.M. October 9, 1983
Authority: Stoughton Police Dept.
Amount of charges: $30.00 $1725.00 This is 3rd Tow Storage Notices

You are hereby notified that unless the charges for towing, storage and other care of your motor vehicle as herein listed, are paid within ten (10) days of this demand that a civil action or a petition will be brought by this establishment in Stoughton to have your said vehicle
name of superior or District Court
sold to satisfy the debt you have incurred by reason of said towing, storage and care of your motor vehicle.

Signed:

Jordan Gelman
D/B/A Automotive Towing

with his reasons therefor. If a by-law of a town takes effect by reason of the failure of the attorney general to seasonably act upon a request for its approval, the clerk of such town shall enter in his records a statement that the by-law has become effective by reason of such failure of the attorney general to act. Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town. The publication of a zoning by-law shall include a statement that claims of invalidity by reason of any defect in the procedure of adoption or amendment may only be made within ninety days of such posting or of the second publication and a statement indicating where copies of such by-law may be examined and obtained. The requirements of publishing in a town bulletin or pamphlet and posting, or publishing in one or more newspapers, as above, may be dispensed with if notice of the by-laws is given by delivering a copy thereof at every occupied dwelling or apartment in the town, and affidavits of the persons delivering the said copies, filed with the town clerk, shall be conclusive evidence of proper notice hereunder. This section shall not apply to cities.

Exhibit # 5

William M. Shipps
165 Quincy Shore Drive
Quincy, MA 02171

February 17, 1984

Automotive Towing
591 Washington St.
Stoughton, MA 02072

Dear Sir,

I am in receipt of your letter of Feb. 6, 1984 notifying me of your intention to seek civil action in the courts. I at this time would welcome this action for after your first notice (not second) and my coversation with you. Where I agreed to meet with you the following week to resolve the matter you were not available nor could you be reached at your place of business. My position on this matter is the same and I believe that the vehicle in question was towed and seized without cause. Therefore said actions by the parties inolved would constitute the illegal seizer of one's lawfully owned property and deprive him of his lawful use of the same. Any costs for replacement or vehicle rental will be sought while the vehicle is being held illegally and is depriing the owner of his constitutional right to own property that can not be unreasonably seized.

I therefore am again demanding that my lawfully owned property be returned forthwith. Failure to do so will be construded as your personal action to deny and deprive me of said property. I believe that this action is only one of harasment and intimidation by the police for other reasons not related to this matter. Kindly notify me of your intentions as soon as possible. Thank you.

Yours truly,

Exhibit # 6

William M. Shipps
165 Quincy Shore Drive
Quincy, MA 02171

June 26, 1984

Stoughton Police Dept.
26 Rose St.
Stoughton, MA 02072

Dear Chief Gross

I being the lawful owner of a 1976 Ford Maverick, Vehicle ID# 397-FFA, which was towed from Kwedar Ave. on October 9, 1983 at the direction of one of your police officers. Do hereby respectfully request copies under the freedom of information act of any and all police reports, notes, writings, orders, requisitions of correspondence regarding the authorizing, removal and storage of said vehicle. As required, I would be glad to pay your established charge for the reproduciton of those documents.

Thank you for your kind consideration and assistance.

Yours truly,

William M. Shipps

Exhibit # 7

William M. Shipps
165 Quincy Shore Drive
Quincy, MA 02171

July 8, 1984

Sec. of State
Public Records Division
One Ashburton Place
Boston, MA 02018

Dear Sir,

I would like to formally complain about the Chief of Police in the town of Stoughton for not complying with the freedom of informations act. As you can see by the enclosed letter, which was delivered to him by hand, I have asked for certain public information and records that I have a statutory right to. He, as of this date, has not sent the requested information to me as I was told he would do on June 26, 1984. The information is needed by July 23, 1984 for a court hearing on a related matter. Therefore, I must request your assistance in preventing the continuation of this statutory violation of my rights regarding my reasonable request.

Thank you for your kind consideration and assistance.

Yours truly,

William M. Shipps

United States District Court

District of Massachusetts

Civil Action No. 86-1364-K

Memorandum

December 22, 1986

This action arises from an incident in which defendant Stoughton Police Officer Francis Poillucci approached a parked car owned by plaintiff, placed its occupants -- plaintiff's son and another youth -- in protective custody, searched the car, and arranged to have it towed to defendant Gelman's storage lot. Plaintiff has sued Officer Poillucci, Police Chief William Gross, Sergeant Thomas Grogan (the duty officer at the police station the night of the incident), and Jordan Gelman (the owner of Automotive Towing Company) for allegedly violating and conspiring to violate his Fourth, Fifth, and Fourteenth

Amendment rights. Although plaintiff, who appears pro se, did not explicitly so allege in his complaint, his memoranda of law indicate that he seeks relief under 42 U.S.C. S 1983. The case is before the court on the motion of the defendants' Gross, Grogan, and Poillucci for summary judgment (Docket No. 24) and plaintiff's motion to strike the affidavit of defendant Gross as well as allegedly scandalous statements made in defendant's memorandum of law (Docket No. 27).

A motion for summary judgment should be granted only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding the motion, a court must examine the record and draw all inferences therefrom in the light most favorable to the motion's opponent. Hahn v. Sargent,

523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 435 U.S. 904 (1976). The court's role is not to weigh the evidence but to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., ___ U.S.___, ___, 106 S. Ct. 2505, 2512 (1986).

As the following examination of the record will show, there are a number of disputed facts in this case. I conclude, however, that there are no disputes of material fact, for even if plaintiff's version of the fact is fully credited, defendants would be entitled to judgment as a matter of law. Defendants' motion will therefore be granted.

It is undisputed that the care involved in the incident, a 1976 Ford Maverick, was owned by plaintiff but primarily used by

his wife. At the time of the incident, plaintiff and his wife had been separated and living apart for one year and nine months, and his wife had had possession and use of the car during their separation. Deposition of William Shipps at 5. At the time of the incident, approximately 2:45 a.m. on October 9, 1983, the car was parked in front of a house next door to where plaintiff's wife was living, with plaintiff's son and a friend sitting in the front seat. Plaintiff alleges that the care was parked legally; defendants contend that the police had received a complaint about the car, and that it was parked in the middle of the street.

Officer Poillucci arrived on the scene and approached the car. According to the defendants, the officer placed the two youths in protective custody and prepared to take them to the police

station because they were drunk. Plaintiff claims that his son informed Officer Poillucci that his mother was at home but the officer would not allow the car to be moved to Plaintiff's wife's driveway. Officer Poillucci mad a call on his police car radio and ordered that the car be towed. plaintiff alleges that Officer Poillucci then made an inventory search of the car; defendants contend that the officer merely inspected the front seat. The care was then towed to the Automotive Towing Company storage lot. Plaintiff alleges that the car was searched a second time at the storage lot. No citation concerning the car was every issued.

Plaintiff's son was released in his mother's custody at approximately 3:30 a.m. that same night. Plaintiff contends that he was not notified by the police or towing company that his car had been towed

until December 14, at which time it had accumulated storage charges of more than $1,700. Plaintiff brought a small claims action against defendant Gelman in Stoughton District Court, in which judgment was entered that the car be released to plaintiff upon payment of $100. Plaintiff has not proffered payment or obtained his car.

Plaintiff first claims that the alleged searches and seizure of the automobile violated his Fourth Amendment rights. The Fourth Amendment protection against unreasonable search and seizure had a reasonable and legitimate expectation of privacy in the locus of the search. United States v. Dall, 608 F.2d 910 (1st Cir. 1979). Plaintiff seeks to establish a protected privacy interest on the sole basis of his ownership of the car. The First Circuit has held, however, that although ownership is a relevant

factor in the inquiry, "(o)wnership alone is not enough to establish a reasonable and legitimate expectation of privacy. Id at 914.

Plaintiff's privacy interest in the car that was searched is even weaker than the interest that was held to be unprotected in United States v. Dall, supra. In Dall, the owner of a pickup truck with an enclosed camper cap on the back loaned the truck to friends. The friends were taken into police custody and the police performed an inventory search of the truck. Although the truck's occupants did not have the key to the camper cap and disclaimed knowledge of its contents, the police broke into the back of the truck and inventoried its contents. The owner, who was indicted on the basis of stolen goods found in the back of the truck, challenged the search and seizure as a violation of his Fourth Amendment

rights. The court held that only the driver's possession created a legitimate and reasonable expectation of privacy in the truck; the owner's title did not. The court stated, "(t)he already diminished expectation of privacy that attaches to motor vehicles is still further attenuated when the owner had given over possession to another for the other's own uses to the temporary exclusion of the owner." 608 F2d at 915.

unlike Dall, in which the owner of the truck loaned it to friends on a temporary basis, plaintiff had left the car in his wife's possession for one year and nine months at the time of the incident. Furthermore, even when plaintiff and his wife had been living together, the car was primarily used by his wife. I conclude as a matter of law that plaintiff had no legitimate and reasonable expectation of privacy in the

car, and that he therefore has no basis on which to assert a Fourth Amendment claim.

Plaintiff next asserts that he was deprived of the car without due process of law in violation of his Fifth and Fourteenth Amendment rights. This claim is based on allegations that the municipality had not made the area where the car was parked a restricted parking area, that there were no signs in the area that would give notice of any restrictions, and that Officer Poillucci did not issue a traffic citation for illegal parking before towing the car as plaintiff alleges is required by police procedures and state statutes. Defendants contend that towing the car was proper because incident to taking its occupants into protective custody.

To establish a violation of his due process rights, plaintiff must be able to prove that the defendants acted under

color of state law and that the deprivation of property was without due process of law. Parratt v. Taylor, 451 U.S. 527 1981). It is undisputed that plaintiff was deprived of property by officials acting under color of state law. The key inquiry is whether plaintiff can prove that the deprivation was without due process of law.

In Parratt, supra, the Supreme Court considered the requirements of due process with respect to a claim under the Fourteenth Amendment for the negligent deprivation of property. The Court described the fundamental requirement of due process as the opportunity to be heard...'at a meaningful time and in a meaningful manner.'" 451 U.S. at 540. In determining when such opportunity had to be offered in order to be meaningful, the Court distinguished between deprivations resulting from the random and unauthorized

acts of state employees and those which resulted from an established state procedure. Finding that the state could not reasonably predict when random and unauthorized acts might occur, and therefore could not provide a pre-deprivation hearing for losses resulting from such acts, the Court held that the existence of a meaningful post-deprivation state remedy provided sufficient due process to satisfy the requirements of the Fourteenth Amendment with respect to deprivations resulting from random and unauthorized acts. In Hudson v. Palmer, 468 U.S. 517 (1984), the Court extended the Parratt holding to random and unauthorized intentional conduct of state employees, and held that an adequate post-deprivation state remedy was sufficient to provide due process for such intentional deprivations as well. Although plaintiff has cited cases in

which the existence of a post-deprivation state remedy was held not to preclude federal jurisdiction, these cases were all decided before the Supreme Court decisions in Parratt and Hudson and, being in conflict with them, are no longer persuasive.

Evaluating plaintiff's due process claim in light of Parratt and Hudson, I conclude as a matter of law that plaintiff cannot establish a cause of action under the Fourteenth Amendment. First, plaintiff specifically alleges that the defendants' actions were in contradiction to established state procedures and they are therefore the type of random and unauthorized acts for which a post-deprivation state remedy is sufficient. Second, he has a state law remedy against the individual defendants in the form of a common law action for conversion, see Wagner v. Higgins. 754 F2d

186 (6th Cir. 1985), which would be exempt from the Massachusetts immunity statute. See Mass. Gen. Laws Ann. ch.258, S 10. Because plaintiff has an automobile, and any negligent deprivation is not actionable, see Daniels v. Williams, _____ U.S. _____, 106 S. Ct. 662 (1986), I conclude that defendants are entitled to judgment as a matter of law on his due process claim under the Fourteenth Amendment. The Parratt analysis also applies to plaintiff's claim under the Fifth Amendment, see Wagner, supra, 754 F.2d at 193, n.1, and I therefore conclude that defendants are entitled to judgment on plaintiff's Fifth Amendment claim as well.

In summary, I conclude that plaintiff has failed to establish the existence of a dispute of material fact, and that defendants are entitled to judgment as a matter of law on plaintiff's claims that

they violated or conspired to violate his rights under the Fourth, Fifth, and Fourteenth Amendments.

Having reached these conclusions of law without reference to the portions of Chief Gross' affidavit and defendants' memorandum of law to which plaintiff has raised objections, I conclude that his motion to strike is moot.

Robert E. Keeton

United States District Judge

ORDER

December 22, 1986

For the reasons stated in the Memorandum of this date, it is ORDERED:

The motion of defendants Gross, Grogan, and Poillucci for summary judgment is granted.

Plaintiff's motion to strike is dismissed as moot.

Robert E. Keeton

United States District Judge

Memorandum

December 22, 1986

In light of the Memorandum and order of this date, allowing summary judgment for defendants Gross, Grogan, and Poillucci, the plaintiff and the remaining defendant are invited to file in writing, on or before january 31, 1987, a statement of their respective positions as to what disposition should be made of plaintiff's claim against that defendant.

Robert E. Keeton

United States District Judge

UNITED STATES COURT of APPEALS

FOR the FIRST CIRCUIT

No. 87-1462

William M. Shipps,

Plaintiff, Appellant,

V.

Stoughton Police Department et al.

Defendants, Appellees.

Before

Campbell, Chief Judge,

Coffin, Bownes, Breyer, Torruella, and Selya,

Circuit Judges.

ORDER OF COURT

Entered January 8, 1988

Treating the appellant's "petition for in banc consideration" as a request for rehearing in banc, it is denied.

By the Court:

Francis P. Scigllano

Clerk.

UNITED STATES COURT of APPEALS

FOR the FIRST CIRCUIT

No. 87-1462

William M. Shipps,

Plaintiff, Appellant,

V.

Stoughton Police Department et al.

Defendants, Appellees.

JUDGEMENT

Entered December 10, 1988

This case was submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The order of the disrtict court is affirmed.

By the Court:

Francis P. Scigllano

Clerk.

UNITED STATES COURT of APPEALS
FOR the FIRST CIRCUIT

William M. Shipps Plaintiff, Appellant	*	Civil Action No. 87-1462
V.	*	
Stoughton Police Dept. et al. & Jordan Gelman d/b/a Automotive Towing Co. Defendants	*	Appeal Order to THE UNITED STATES SUPREME COURT

****

I, William M. Shipps, the plaintiff in the above matter hereby appeal the affirming of the District Court's order dated December 22, 1986 and April 10, 1987 by the Appeals Court of the First circut. I also request that record be certified and transmitted to The Supreme Court's Clerks office for docketing. Enclosed I am tendering my $200.00 filing fee for said appeal.

By:_____
William M. Shipps
Pro se Plaintiff
123 Sumner St.
Quincy, MA 02169